Supreme Court, U.S.
FILED
FEB 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-981

In the Supreme Court of the United States

OCTOBER TERM, 1986

MAJOR MEDIA OF THE SOUTHEAST, INC., d/b/a NAEGELE OUTDOOR ADVERTISING CO. OF RALEIGH-DURHAM, PETITIONER

v.

CITY OF RALEIGH, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR THE PETITIONER

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The Petition presents a question regarding municipal zoning power that is of fundamental importance to businesses and governments across the nation: whether a local ordinance that declares certain uses of land unlawful and requires the removal of existing, economically valuable nonconforming structures (here, outdoor advertising signs) within a period of time well short of the actual useful life of the structures constitutes a taking of property for which the Fifth and Fourteenth Amendments require payment of just compensation. Raleigh's response fails to address the constitutional question presented in any meaningful way and rests upon a series of misconceptions about the nature of the issue presented.

1. The Brief in Opposition largely ignores the important questions of constitutional doctrine presented by this case. This Court recognized more than 60 years ago in *Pennsylvania Coal*, and has confirmed on several recent

occasions, that the just compensation requirement of the Takings Clause can be triggered by governmental regulation that goes "too far" in diminishing or destroying economically viable uses of property. See Pet. 11-13. How far is "too far" is a question this Court has sought to address in numerous recent cases; but it has made little progress in resolving the issue because of procedural infirmities in the cases accepted for review, which, from *Agins* to *Yolo County*, have repeatedly been found to lack requisite finality or ripeness.

The instant case does not have the procedural flaws of the earlier cases [1] and is also an excellent complement to those presently pending. While the other recent and pending cases address the issue of regulatory takings principally in the context of regulations that affect *planned or potential future uses* of property, this case adds the further dimension of the power of government, as part of the zoning process, to force discontinuation of *existing and previously lawful uses* of property without payment of compensation.

Respondent seeks to justify its ordinance by pointing to the fact that forced removal of Naegele's lawfully erected signs is deferred for an "amortization" period, but its reliance upon the "amortization" concept is not accompanied by any explanation of why a deferral of the taking should nullify any compensation obligation that might otherwise exist. Certainly, respondent's unadorned assertion that "[t]he concept of amortization cannot be questioned" (Opp. 16) does not constitute a satisfactory answer to the arguments advanced in the Petition.

Indeed, respondent's Brief in Opposition is remarkable for its failure to come to grips with the constitutional

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[1] Respondent does not dispute that the extent of the impairment of property interests resulting from its ordinance is concretely and finally determinable at this time, so that the controversy is ripe for resolution by this Court. See Pet. 6-7 n.3.

objections to amortization as a substitute for compensation. To the extent the amortization concept is defended (rather than just described), it is simply to assert (Opp. 8) that "[a] 'taking' and a valid exercise of the police power are mutually exclusive concepts absent a physical invasion of the property * * *." This argument (addressed and refuted at Pet. 19) has extraordinary consequences: *Berman* v. *Parker*, 348 U.S. 26 (1954), held that a city wishing to improve the beauty of its environment could take private property for that purpose, provided just compensation were paid; but if the proposition on which Raleigh rests its argument is correct, a city could accomplish precisely the same thing at no cost to itself simply by declaring the property in question to be "nonconforming" and ordering the owners to remove it, without compensation, after a short "amortization" period. The Brief in Opposition offers no explanation for this incongruous result. Surely, the validity of respondent's dubious contention is a matter of substantial constitutional significance, and Raleigh's dependence upon it simply enhances the importance of and need for review by this Court.[2]

The Brief in Opposition also fails to mention, much less discuss, such cases as *Pennsylvania Coal*, *Penn Central*, or *San Diego Gas & Electric*, which frame the constitutional issue presented here. The sole citation to any discussion of regulatory takings in opinions of this Court is a paraphrase (Opp. 9) of an uncontroversial but essentially immaterial observation in *Agins* that the government is not a guarantor of private profits or property values. In fact, *Agins* contradicts respondent's proposition that a valid exercise of the police power cannot amount to

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[2] The concept that regulatory takings occur only when the regulation in question violates due process is the basis of arguments made to the Court in the pending regulatory takings cases. *See, e.g.*, National Conference of State Legislatures Am. Br. in *Keystone* (No. 85-1092), at 7-16.

a taking, since the question there was whether municipal zoning ordinances that were indisputably valid nevertheless took the appellants' property without just compensation. See 447 U.S. at 257.

2. Those arguments that respondent actually does advance in opposition to the Petition are seriously flawed because they rest upon three fundamental misconceptions: first, that Naegle's case depends on an allegation that the 1983 Ordinance takes its entire outdoor advertising business in the Raleigh-Durham area, rather than specific property interests; second, that the ordinance has little actual impact upon Naegele's business in Raleigh; and finally, that the case challenges the reasonableness of the particular amortization scheme Raleigh has adopted rather than the constitutionality of the amortization concept. We briefly address these points.

a. A central theme of respondent's argument is that the Constitution does not guarantee the right to use property to engage in a particular business (Opp. 8) and that Raleigh's ordinance "does not destroy Naegele's business." Opp. 3. Respondent attempts to sustain the result reached by the court of appeals by suggesting (Opp. 11) that Naegele will be able to maintain its signs alongside federally protected roads, that it owns structures outside Raleigh that are not affected by the ordinance, that it may erect new, conforming signs in districts zoned for industrial uses, and that it may continue to operate that part of its business not involving off-premise signs.[3]

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[3] The last opportunity may be short-lived. The Brief in Opposition suggests (at 2 n.1) that Raleigh now contemplates requiring removal of large numbers of on-premise signs. This proposed action would substantially increase the business injury caused by the city's sign regulations (see North Carolina Restaurant Association Am. Br. 4-5) and makes it all the more important that this Court review the holding of the court of appeals in the instant case.

Putting to one side for the moment the correctness of these factual assertions, this line of argument entirely misses the point that distinguishes this case from ones involving only lost opportunities for economic development. The essence of the takings claim here relates not to the limitations imposed by the ordinance upon the erection of new signs, nor to any inability of Naegele to maintain its business nationwide, in the State of North Carolina, in the Raleigh-Durham area, or even in Raleigh itself. Rather, the heart of Naegele's claim is that the regulation will bring about the effective destruction of 174 existing, income-producing signs that plainly constitute private property and that Raleigh itself acknowledges (Opp. 9-10) are of substantial value.[4] Even if Naegele could erect 174 new signs at other locations, that would have no bearing on whether the requirement to tear down existing lawfully erected structures constitutes a taking of those signs that must come down. See Pet. 18-19 n.12.

Respondent largely ignores the main loss of property—the signs themselves—caused by Raleigh's regulation. It does assert at one point (Opp. 11) that "it takes little imagination to realize" that Naegele's non-conforming signs can be relocated elsewhere in North Carolina. We are not aware that "imagination" had become a basis for granting summary judgment. The reality is that the signs, most of which are substantial structures with

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[4] The ordinance will also deprive Naegele of all economic value in property interests it possesses in many of the parcels where those signs are located. It is no answer to say, with respect to Naegele's leases, that some of them contain provisions allowing their termination if signs may not lawfully be maintained on the property (see Opp. 12 ¶ 6). If the leases have economic value to Naegele that is entirely extinguished as a result of the ordinance (a matter that would have to be determined at a trial), their loss would give rise to a compensable taking, and it is irrelevant that Naegele does not also incur the obligation to pay a penalty to the lessor.

deeep in-ground foundations (see Outdoor Advertising Association of America Am. Br. 7), will have only scrap value when taken down (C.A. App. 356) and therefore cannot simply be relocated elsewhere.

b. Even if it were relevant to the takings claim whether Naegele retains adequate opportunities to continue its billboard business at other locations in Raleigh, respondent substantially misdescribes the impact of its ordinance on those opportunities. It is a classic of understatement to say that "[t]he only difference between the new regulations and the old are that a fewer number of signs will be permitted and those will be smaller in size" (Opp. 3). While the small sizes permitted for off-premise signs under the ordinance may have utility in areas with heavy pedestrian traffic or slow-moving vehicular traffic, they are wholly impractical for the most common uses of outdoor advertising. See The Advertising Council Inc. Am. Br. 14 n.4. Equally important, because the ordinance limits the location of even the small off-premise signs it permits to only two of Raleigh's 22 zoning districts, and because the signs must be at least 400 feet from the boundaries of any zone allowing residential use (19 of the 22 zones) and at least 1000 feet from any other off-premise sign, there are in fact few and inadequate opportunities for Naegele to replace the existing signs when those are destroyed. In reality, the only business left to Naegele will be along those highways where federal and state law prevent Raleigh from ordering removal of signs without payment of just compensation; and the value of this rump business will be millions of dollars less than the value of the business that now exists.

c. The third misconception, which underlies the analysis of the court of appeals as well as the Brief in Opposition, is that the case turns upon the reasonableness of the particular "amortization" period permitted by Raleigh (and that Naegele's response to Raleigh's summary judgment motion was insufficient to create an issue of

fact on this subject). See Pet. App. 9a-10a; Opp. 5, 10, 16. The reasonableness of the Raleigh amortization period, however, is not the issue the Petition presents. The Petition asks this Court to determine not whether the 5½ year delay in the 1983 Ordinance is too short, but whether a compensable taking occurs when, at the end of whatever period of delay may be permitted, property retaining substantial value must be abandoned or destroyed as the result of governmental action.

In fact, the amortization concept makes no sense as a means of analyzing whether a zoning regulation works a compensable taking of private property. Certainly the suggestion (Opp. 9) that the doomed signs can be fully depreciated for tax purposes in five years cannot be relevant. If the government were to take fully depreciated property by eminent domain, it would nevertheless have to pay compensation equalling the property's actual market value. Respondent fails to explain why a taking by regulation should produce a different result.

Neither does the fact that Naegele's signs are capable of producing large amounts of income during the period they are allowed to remain in place (Opp. 9-10) justify the amortization concept. Indeed, this suggestion shows how substantially respondent misapprehends the relevant legal principles, for quite the opposite conclusion flows from the argument. The more income a sign produces, the more valuable it is and the greater is the loss suffered by its owner when it must be destroyed. The fact that the signs produce a substantial flow of income that would continue after the end of the amortization period simply proves the need to provide just compensation for their forced destruction.

Nor, finally, is respondent correct in asserting that the amortization concept is accepted almost universally as a permissible alternative to payment of compensation for

forced removal of structures made nonconforming by zoning changes.[5] The Petition cites (at 22-23), and respondent largely ignores, holdings of the Supreme Courts of Ohio, Missouri, Indiana, and New Hampshire, the latter two within the past five years, that amortization may not constitutionally displace just compensation in this context.[6] The contrary cases on which respondent relies (Opp. 7) carry little weight because they fail to engage in the appropriate analysis of the takings claim—perhaps due to the fact that for the most part they antedated the 1978 decision in *Penn Central*, which was the first of a series of recent opinions of this Court framing that analysis.[7]

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[5] Respondent's contention (Opp. 6 n.5) that the Highway Beautification Act, as originally enacted, "allowed the amortization of billboards" is mystifying. The Act from its inception has required the payment of just compensation for forced removal of signs along the federally aided highways to which it applies. See 23 U.S.C. § 131(g) (1965 ed.). The 1978 amendment to which respondent refers simply clarified what was in fact provided at the time the Act was first passed. See *Provision of Compensation by States for Removal of Billboards Under the Highway Beautification Act of 1965*, 42 Op. Att'y Gen. 331 (1966).

[6] Respondent erroneously asserts (Opp. 13) that most of the conflicting cases that the Petition describes were decided on independent state grounds. It specifically mentions only one case, from an intermediate Wisconsin appellate court, which was not in fact invoked by the Petition as a conflicting interpretation of the federal Constitution. Of the four decisions referred to in text, those from Ohio and Missouri explicitly rested on the Fourteenth Amendment. That from Indiana, while not expressly stating its basis, announced its holding in the language of the Fourteenth Amendment ("unconstitutional as the taking of property without due process of law") (see Pet. 23) rather than that of the state constitution (individual injured in property "shall have remedy by due course of law") (Indiana Const., Art. I, § 12). And the New Hampshire court, while indeed relying on state law, employed the same analysis as relevant decisions of this Court.

[7] Respondent also errs in suggesting (Opp. 13-14) that the Court should attach weight to the denials of review in *Joyner* and *Donrey Communications*. The *Donrey* petition presented solely a

3. We suggested in the Petition (at 24-28) that, as an alternative to granting review at this time, the Court should at least hold the Petition for appropriate disposition in light of its decisions in four pending cases involving regulatory takings. Respondent's purported distinctions of the pending cases, which rest on a peculiar reading of those cases combined with a fundamentally mistaken view of the issues in the instant case (discussed above at pages 4-8), warrant no response.

* * * * *

Respondent contends that, by asserting a right to compensation for forced removal or destruction of valuable property made nonconforming by the 1983 Ordinance, Naegele seeks to "frustrate changes and improvements" in zoning (Opp. 9) and that adoption of its legal position would "penalize the public" by denying the power to eliminate land uses that "changing [public] needs, mores and sentiments" supposedly no longer deem appropriate (Opp. 17). In fact, nothing in Naegele's position here prevents Raleigh from taking whatever action it deems best advised with respect to regulation of signage. Naegele asks only, as the Takings Clause intended in prohibiting uncompensated takings of private property, that it not be required "alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Connolly* v. *PBGC*, 106 S. Ct. 1018, 1027 (1986), quoting *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960).

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statutory issue under the Highway Beautification Act, not a Takings Clause issue (see 52 U.S.L.W. 3784 (U.S. Apr. 24, 1984)), while *Joyner* involved leases entered into after the passage of the challenged ordinance, not any preexisting property interest (see 211 S.E. 2d at 326).

Respectfully submitted.

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